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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ENRIQUE SOSA, Defendant and Appellant.	G055993 (Super. Ct. No. 16CF0441) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed, sentence vacated in part, and remanded for resentencing.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Carlos Enrique Sosa appeals from the judgment of conviction entered after a jury found him guilty of six counts of committing a lewd act on a child under 14 years old. We affirm and remand for resentencing. Sosa's contentions of evidentiary and instructional error regarding evidence pertaining to the Child Sexual Abuse Accommodation Syndrome (CSAAS) are without merit. As conceded by the Attorney General, the trial court erred by imposing consecutive sentences for the three sex crimes Sosa committed against K.D. (counts 1 through 3) because they were committed against a single victim on a single occasion within the meaning of the version of Penal Code section 667.61, former subdivision (g) that was in effect at the time those crimes were committed in 2003.[1] (Added by Stats. 1994, 1st Ex. Sess. 1994, ch. 14, § 1, p. 8570.) The trial court also failed to make a probable cause finding under section 1202.1, subdivision (e)(6)(A)(iii) before ordering Sosa to submit to AIDS testing as to all six counts. Our record does not contain substantial evidence bodily fluids capable of transmitting HIV were transferred from Sosa to either of the victims. On remand, the trial court shall resentence Sosa on counts 1 through 3 and, at the election of the prosecution, conduct further proceedings under section 1202.1, subdivision (e)(6)(A)(iii).

FACTS

I.

OFFENSES AGAINST K.D.

During the summer of 2003, then-five-year-old K.D. lived with her father and would visit her mother during the weekends. K.D.'s mother rented a room in Sosa's one-bedroom apartment; Sosa lived there with his family. On one occasion that summer, Sosa knelt down next to K.D. as she was lying on the floor of the living room of the

[1] All further statutory references are to the Penal Code unless otherwise specified.

apartment watching television. He told her she was beautiful and stroked her hair and kissed her on the mouth. Using his feet, he spread K.D.'s legs and positioned his body between them. He pulled down her skirt and pulled down his pants. K.D. closed her eyes, felt Sosa laying on top of her, and then felt a lot of pain inside her vagina.

When K.D. screamed for her mother, Sosa covered her mouth with his hand and kept it there for a while; he told her it was "going to be okay." He eventually pulled up his pants and told her that "it was [their] secret." K.D. did not tell anyone about what Sosa had done until 2014 when she told her aunt and her cheer coach; shortly thereafter she spoke with the police.

II.

OFFENSES AGAINST J.L.

Sosa's wife Margarita babysat J.L. at the Sosas' apartment while J.L.'s mother was at work. Sosa worked nights and was home during the day most of the time. J.L. often watched television in the bedroom of the apartment. When J.L. was five years old, Sosa began to touch her inappropriately in the bedroom. J.L. testified that initially, Sosa "would grab [her] butt" and squeeze it over her clothes any time she passed by him. She stated that because Sosa continued to do that, she assumed she was doing something wrong that made his conduct okay.

When J.L. was still five years old, Sosa started to grab her "in [her] lady parts." Initially, Sosa touched her vagina and chest over her clothing. Eventually, he started touching her under her underwear and did so more than 20 times over the years; Sosa's touching caused her to feel pain. Sosa also kissed her on the cheek and lips, stuck his tongue into her mouth, and licked her chest under her shirt. He told her not to tell anyone what he was doing.

When J.L. was eight years old, she remembered an incident where she had "blood coming out" around the time Sosa touched her vagina. J.L. was afraid to tell anyone about Sosa's conduct and she feared her mother would be mad at her because the

conduct had gone on for so long without her having spoken up. J.L. unsuccessfully tried to persuade her mother not to take her back to the Sosas' apartment by making up excuses. For example, she told her mother that she did not want to go to the Sosas' apartment because she was dropped off too early in the morning. In October 2006, J.L. told her mother and a social worker about Sosa's conduct. J.L.'s mother contacted the police.

PROCEDURAL HISTORY

Sosa was charged in an information with six counts of committing a lewd act upon a child under 14 years of age in violation of section 288, subdivision (a). As to all counts, the information alleged, pursuant to section 667.61, subdivisions (b) and (e)(5), that in the commission of the offenses, Sosa committed an offense specified in section 667.61, subdivision (c) against more than one victim. The information further alleged, pursuant to section 801.1, subdivision (a), as to all counts that the two victims in the case were minors under the age of 18 years at the time the offenses were committed against them and had not yet attained the age of 28 years of age at the time the prosecution was commenced. The jury found Sosa guilty on all counts and found all of the sentencing enhancement allegations and the limitation period extension allegations true.

The trial court imposed a total prison term of 90 years to life. Sosa appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE OF CSAAS.

A.

Dr. Ward's Testimony

Forensic psychologist Dr. Jody Ward testified at trial about CSAAS, which she defined as the pattern of behaviors exhibited by many children who have been sexually abused. Ward explained that CSAAS includes five stages or components, some or all of which child sexual abuse victims may experience. Those stages or components are: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed and unconvincing disclosure, and (5) retraction or recantation. She stated CSAAS should not be used to "diagnose whether or not sexual abuse occurred" because that has never been its purpose. She testified that CSAAS helps therapists or laypeople understand why some children respond to sexual abuse the way they do because many times their behavior may seem counterintuitive or not what one might expect of a sexual abuse victim.

Ward stated she had no knowledge of any facts of the instant case, had not spoken with either victim in the case, was unaware of either victim's gender, and had not conducted an independent investigation or read any police reports related to the charged offenses. She also stated she was solely testifying as a "teaching expert" and as such had not formed any opinion about the truthfulness or credibility of any witness.

B.

The Trial Court Did Not Abuse Its Discretion Under Evidence Code Section 352 by Admitting Ward's Testimony.

Sosa argues Ward's testimony regarding CSAAS was irrelevant and unduly prejudicial under Evidence Code section 352, and therefore the trial court abused its discretion by denying his motion to exclude such testimony. Evidence Code section 352 allows for the exclusion of evidence "if its probative value is substantially outweighed by

the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's decision to admit or exclude evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

Contrary to Sosa's assertion in his appellate opening brief that "CSAAS evidence should be held inadmissible in California for all purposes," California courts have held, as also acknowledged by Sosa, that CSAAS evidence is admissible when offered to show that the victim did not act inconsistently with abuse to dispel common misperceptions about a child's reaction to abuse, or to rebut a defendant's attack on the victim's credibility. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1069; *People v. Perez* (2010) 182 Cal.App.4th 231, 245; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745 (*Patino*); *People v. Housley* (1992) 6 Cal.App.4th 947, 956; *People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394; *People v. Gray* (1986) 187 Cal.App.3d 213, 218-220.)[2]

Here, Ward's testimony was relevant to disabuse the jurors of misconceptions they might have had about children who are sexual abuse victims, to show that J.L. and K.D. did not act inconsistently with abuse, and to rebut Sosa's attack on their credibility. J.L. and K.D. each displayed at least three categories of CSAAS—secrecy, helplessness, and delayed disclosure. J.L. also displayed the CSAAS category of entrapment and accommodation.

The defense sought to challenge J.L.'s and K.D.'s credibility with regard to these characteristics. The defense theory was that J.L.'s and K.D.'s accounts of sexual abuse by Sosa were not plausible. (See *Patino*, *supra*, 26 Cal.App.4th at p. 1744 [CSAAS testimony is admissible for limited purpose of disabusing a jury of misconceptions about child sexual abuse victims' reactions when "the victim's credibility

[2] The cases Sosa cites from other states that have held CSAAS evidence inadmissible are inconsistent with the California cases admitting CSAAS evidence.

is placed in issue due to the paradoxical behavior"].) In her opening statement, Sosa's trial counsel told the jury "[a]s we talked about in jury selection, this is going to come down to the credibility of witnesses." Counsel also emphasized the case involved delayed reporting of abuse.

In her closing argument, Sosa's trial counsel asked the jury to assess the victims' credibility and to consider whether they admitted to be untruthful, arguing, "J[.L.] told us, yes, she did lie to her mom about the reason why she didn't want to go back to the daycare. Once mom's schedule became early and she had to drop her off at 5:00 a.m., she kept telling her mom she didn't want to go. It was too early. Once she was disciplined by her mother giving her problems going to daycare is when this disclosure was made." As for K.D., Sosa's trial counsel argued, "[s]he reported 11 years after the alleged incident occurred when she was teenager. She told us she was on a cheerleading squad, and feeling depressed, and had started talking to a counselor at school. So you have to consider what impact in the delay the reporting had on you as well and to her credibility."

Ward's testimony about CSAAS was highly probative in understanding the victims' behavior following the incidents of sexual abuse each experienced. Whatever prejudice that testimony might have caused was not undue and certainly did not outweigh, much less substantially outweigh, the testimony's probative value. As discussed *post*, the jury was instructed with CALCRIM No. 1193 on the limited use of Ward's testimony. Ward, Sosa's trial counsel, and the prosecutor each stated that Ward's testimony was solely given in the capacity of a teaching expert and that she was unaware of the facts of the instant case and had no opinion about it.

The trial court did not abuse its discretion by admitting Ward's testimony under Evidence Code section 352.

C.

The Admission of Ward's Testimony Did Not Violate Sosa's Due Process Rights.

Sosa contends that Ward's testimony was "used to unfairly corroborate the complaining witnesses' testimony, thereby depriving [Sosa] of due process and a fair trial." Sosa did not raise this argument in the trial court and has not offered any analysis of how he contends his constitutional rights were violated in his appellate briefing.

"[I]ntroduction of CSAAS testimony does not by itself deny appellant due process." (*Patino, supra,* 26 Cal.App.4th at p. 1747.) In *Estelle v. McGuire* (1991) 502 U.S. 62, 70, the United States Supreme Court held that admission of evidence of battered child syndrome did not violate the defendant's due process rights because the evidence was relevant. We have concluded, *ante*, the CSAAS evidence was highly relevant here to explain the victims' responses to Sosa's sexual abuse.

Even if the CSAAS evidence had been erroneously admitted, reversal would be warranted only if we were to conclude that it is reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Scheid* (1997) 16 Cal.4th 1, 21; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In this case, the victims' testimony was substantial evidence of the various acts of sexual abuse with which Sosa was charged. The possibility that the jury might have viewed Ward's testimony as corroboration of the victims' testimony, rather than an explanation of the victims' behavior, was very low. Ward testified that CSAAS could not be used to diagnose whether sexual abuse had occurred, and CALCRIM No. 1193, which was given to the jury, limited the jury's consideration of Ward's testimony. Accordingly, if we were to consider this issue on its merits, we would conclude there was no prejudicial error.

II.

THE JURY WAS PROPERLY INSTRUCTED WITH CALCRIM NO. 1193.

The correctness of the jury instructions is determined by considering the entire charge of the court, and not one instruction or one part of an instruction. (*People v. Bolin* (1998) 18 Cal.4th 297, 328; *People v. Saavedra* (2018) 24 Cal.App.5th 605, 614.)

Sosa argues the trial court erred by instructing the jury that Ward's testimony regarding CSAAS could be used in judging the victims' credibility. The court instructed the jury with CALCRIM No. 1193 as follows: "You have heard testimony of Dr. Jody Ward regarding child sexual abuse accommodation syndrome. [¶] Dr. Ward's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not K[.]D. and/or J[.]L.'s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony."

CALCRIM No. 1193 correctly states the law, and the trial court did not err in giving it to the jury. In *People v. McAlpin* (1991) 53 Cal.3d 1289 at page 1300, the California Supreme Court stated that CSAAS evidence is admissible to rehabilitate the credibility of a child abuse victim when the defendant suggests the victim's conduct after the abuse is inconsistent with the child's testimony. While it is true that evaluating an alleged molestation victim's "believability" may ultimately assist the jury in determining whether to credit the victim's testimony that the molestations occurred, the same may be said of any evidence that is admitted solely on the issue of a witness's credibility.

In *People v. Gonzales* (2017) 16 Cal.App.5th 494, the appellate court, in rejecting a challenge to CALCRIM No. 1193, stated: "Gonzales argues the instruction is inconsistent. It states that the CSAAS testimony is not evidence the defendant committed the charged crimes, and also that the jury may use the evidence in evaluating the believability of [the victim]'s testimony. Gonzales argues it is impossible to use the

CSAAS testimony to evaluate the believability of [the victim]'s testimony without using it as proof that Gonzales committed the charged crimes. [¶] But the instruction must be understood in the context of [the expert]'s testimony. [The expert] testified that CSAAS is not a tool to help diagnose whether a child has actually been abused. She said that if it is not known whether a child has been abused, CSAAS is not helpful in determining whether a child has, in fact, been abused. The purpose of CSAAS is to understand a child's reactions when they have been abused. [¶] *A reasonable juror would understand CALCRIM No. 1193 to mean that the jury can use [the expert]'s testimony to conclude that [the victim]'s behavior does not mean she lied when she said she was abused. The jury also would understand it cannot use [the expert]'s testimony to conclude [the victim] was, in fact, molested. The CSAAS evidence simply neutralizes the victim's apparently self-impeaching behavior.* Thus, under CALCRIM No. 1193, a juror who believes [the expert]'s testimony will find both that [the victim]'s apparently self-impeaching behavior does not affect her believability one way or the other, and that the CSAAS evidence does not show she had been molested. There is no conflict in the instruction." (*Id.* at pp. 503-504, italics added.)

In *People v. Gonzales, supra,* 16 Cal.App.5th at page 504, the court stated that "the jury can use [the expert]'s testimony to conclude that [the victim]'s behavior does not mean she lied when she said she was abused"; Sosa argues that if the CSAAS testimony is used to conclude that the complaining witness did not lie then it is "almost certain" it will be considered "as supportive of the truth of the charges made against [Sosa]." There is a difference between saying you can use the evidence to conclude the witness did not lie, and saying you can use the evidence to conclude that the witness's self-impeaching behavior does not mean she lied. The *People v. Gonzales* court gave as examples of such self-impeaching behaviors: the child still wanting comfort from the abuser and acting loving and trusting toward him; failing to cry out for help; trying to

forget about the abuse; and failing to remember each incident or the precise details of each incident. (*Id.* at p. 499.)

As CSAAS evidence may properly be used to determine whether the conduct of a child abuse victim was inconsistent with that of a person who has been molested, it could properly be used to evaluate a victim's credibility. The trial court did not err by instructing the jury with CALCRIM No. 1193.

III.

WE REMAND FOR RESENTENCING ON COUNTS 1 THROUGH 3.

Sosa contends the trial court erred by imposing consecutive sentences on counts 1 through 3 because those crimes were committed against a single victim on a single occasion within the meaning of the version of section 667.61, former subdivision (g) that was in effect when he committed those crimes in 2003. The Attorney General agrees the sentences for counts 1 through 3 should be vacated and remanded for resentencing.

Both Sosa and the Attorney General cite *People v. Jackson* (2016) 1 Cal.5th 269 at pages 354 to 355, in which the Supreme Court stated: "Section 667.61, former subdivision (g), in effect until 2006, provided that sentences for the sex crimes for which Jackson was convicted 'shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion.' [Citation.] Sex offenses 'occurred on a "single occasion" if they were committed in close temporal and spatial proximity.' (*People v. Jones* (2001) 25 Cal.4th 98, 107 [holding that defendant should have received a single life sentence—as opposed to three consecutive sentences—for vaginally and anally raping victim and forcing her to orally copulate him in the backseat of a car during the span of one and a half hours].) The rule 'should result in a single . . . sentence . . . for a sequence of sexual assaults by [a] defendant against one victim that occurred during an uninterrupted time frame and in a single location.'"

Here, Sosa was convicted in counts 1 through 3 of three sex crimes against K.D., all of which occurred during a short and continuous time period in a single location, the bedroom of Sosa's apartment. We agree with the parties that the circumstances show the crimes occurred with "close temporal and spatial proximity." (*People v. Jones, supra*, 25 Cal.4th at p. 107.) On remand, the trial court shall resentence Sosa on counts 1 through 3 in accordance with former subdivision (g) of section 667.61.

IV.

The Trial Court Erred by Ordering Sosa to Submit to AIDS Testing Without a Probable Cause Determination.

Section 1202.1 provides in part that the trial court "shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immunodeficiency syndrome (AIDS) within 180 days of the date of conviction." (*Id.*, subd. (a).) A "sexual offense" within the meaning of section 1202.1 includes "[l]ewd or lascivious conduct with a child in violation of Section 288," only "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (*Id.*, subd. (e)(6)(A)(iii).) Subdivision (e)(6)(B) of section 1202.1 provides "[f]or purposes of this paragraph, the court shall note its finding on the court docket and minute order if one is prepared."

At the sentencing hearing, the trial court stated to Sosa: "You are further ordered to submit to a nonconfidential AIDS testing as directed by the Department of Corrections." The court's minute order states that Sosa was required to submit to AIDS testing as to all six counts. Neither the reporter's transcript nor the clerk's transcript reflects the trial court made a probable cause finding on any of the counts.

"[A]bsent an objection in the trial court, a defendant forfeits appeal of any deficiency in the statutorily required finding supporting an HIV testing order pursuant to

Penal Code section 1202.1, subdivision (e)(6) or a notation of that finding in the docket or minutes." (*People v. Stowell* (2003) 31 Cal.4th 1107, 1117, fn. omitted.) "[S]ince involuntary HIV testing is strictly limited by statute and Penal Code section 1202.1 conditions a testing order upon a finding of probable cause, a defendant may challenge the sufficiency of the evidence even in the absence of an objection. Without evidentiary support the order is invalid." (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.)

If there is insufficient evidence in the record on appeal to support the testing order, given the serious health consequence of HIV infection, the appropriate remedy is to remand for further proceedings, at the election of the prosecution, to allow the prosecution to present any additional evidence it may have to establish the requisite probable cause or to strike the testing order. (*People v. Butler, supra,* 31 Cal.4th at p. 1129.) Here, counts 1 through 3 were based on Sosa touching K.D.'s vagina, kissing K.D. on the mouth, and caressing K.D.'s hair, respectively. Counts 4 through 6 were based on Sosa touching J.L's vagina on two occasions and kissing her on the mouth on one occasion. There is no evidence in this record showing that bodily fluids capable of transmitting HIV were transferred from Sosa to either of his victims and no probable cause assessment is contained in our record. The testing order must therefore be stricken, with the matter remanded to the trial court for further proceedings as required by section 1202.1, subdivision (e)(6)(A)(iii), at the election of the prosecution. (*People v. Butler, supra,* 31 Cal.4th at p. 1129.)

DISPOSITION

The judgment of conviction is affirmed. The sentences on counts 1, 2, and 3 are vacated and the AIDS testing order is stricken. The matter is remanded to the trial court for resentencing on counts 1, 2, and 3 and also, at the election of the prosecution, for further proceedings required by section 1202.1, subdivision (e)(6)(A)(iii).

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.